In the High Court of Judicature at Madras

Dated: 20/10/2004

Coram

The Hon'ble Mr. Justice P. Sathasivam
and
The Hon'ble Mr. Justice S.K. Krishnan

O.S. Appeal No.218 of 1998

1. M/s. Shaw Wallace & Co., Ltd.,
2. M/s. India Steamship Co., Ltd., .. Appellants

-vs-

The Union of India by the Secretary
Department of Space, rep. by the
Senior Purchase Officer
P.S.L.V. Project. .. Respondent

Original Side Appeal preferred against the judgment and decree dated 25.02.1997 passed in C.S.No.1062 of 1988, on the file of this Court.

!For appellants : Mr. K. Bijai Sundar

^For respondent : Mr. R. Santhanam,S.C.G.S.C.
Assisted by
Mr. M.T. Arunan,A.C.G.S.C.

:JUDGMENT

(Judgment of the Court was delivered by P. Sathasivam,J.,)

The defendants in C.S.No.1062 of 1988 on the file of Original Side of this Court, aggrieved by the judgment and decree dated 25.02.1997 , have filed the above appeal.

2. The respondent herein - plaintiff filed the said suit against the defendants praying for a judgment and decree for a sum of Rs.35,17,444/- with interest thereon at 12% per annum from the date of plaint till date of realisation.

3. The case of the plaintiff is briefly stated hereunder:
The plaintiff, Department of Space, having established P.S.L.V. Project of Vikram Sarabhai Space Center at Valiamala, Trivandram for the purpose of Indian Space Research. The second defendant is the owner / carrier of the vessel S.S. RUMIJA. The first defendant is the Shipping Agent of the second defendant. For the purpose of establishing light alloy structure facility at HAL, Bangalore, the plaintiff on the quotation dated

20.11.1985 submitted for and on behalf of M/s. Friedrick Deckel, Aktiongesells Chaft, West Germany by M/s Empire Machine Tools, Bangalore and on further negotiations, placed order dated 29 .08.1986 for supply, installation and commissioning of FP 7, HC Universal Milling and Boring Machine with accessories, spares and for training of buyer's personnel on the machine. The value of the above order was DM 6,23,397.54 equal to Indian currency of Rs.49.87 lakhs approximately.

4. In accordance with the terms and conditions of the Purchase Order, an irrevocable letter of credit dated 23.10.1986, was opened by the plaintiff with the State Bank of India, Valiamala in favour of the suppliers. The suppliers despatched the ONC Universal Milling and Boring Machine, accessories attachments, tools and spares duly packed on board the vessel S.S. RUMIJA and obtained Bill of Lading No.566 dated 23.01.1987 with Port of Destination as Madras from Hamburg and also obtained payment as per the Purchase Order through letter of Credit No.7854/V3/107 of the State Bank of India.

5. The vessel S.S. RUMIJA arrived at Madras Port on 29.03.1987. The Clearing Agents of the plaintiff, namely, M/s. Govias & Sons, Madras noticed on arrival of the consignment, the damaged condition of the cases and contacted the first defendant, the shipping agent of the second defendant at Madras on 30.03.1987 and directed them to arrange for the survey of the consignment. The first defendant by their letter dated 31.03.1997 informed that they could not survey, as the clearing agents of the plaintiff had not taken delivery order after surrendering the original Bill of Lading. Even after the prolonged correspondence, the first defendant took an untenable stand, in their reply dated 05.05.1987, that the survey could not be made for the reason that the time allowed for survey had expired.

6. Having no other option, the clearing agents of the plaintiff removed the consignment to the destination and got the goods surveyed through and with the help of an approved and independent surveyor. The arrival of the consignment in a damaged condition is supported by the document furnished by the Madras Port Trust Authorities in their Landing Certificate dated 17.06.1987, which states that out of the four cases unloaded, planks were broken in three cases and one case weighing 7575 Kgs., was badly damaged.

7. The plaintiff has lodged their provisional claim with the first defendant without quantifying the amount, on 17.06.1987. As requested, the plaintiff sent the documents required by the first defendant, on 11.08.1987. On 01.09.1987, the first defendant required the final claim bill of the plaintiff, in triplicate, which was also furnished to them on 17.11.1987, claiming the sum of Rs.35,17,444/- and the plaintiff requested for an early settlement of its claim.

8. The plaintiff caused a legal notice to the defendants through their counsel's letter dated 06.02.1988. Though the said notice was received by the defendants, they neither sent any reply nor complied with the demand made therein. The second defendant being the carrier / owner of the vessel S.S. RUMIJA and the first defendant being the shipping agent of the

second defendant, both are liable to pay the suit claim compensating the loss sustained by the plaintiff.

9. The defendants filed a written statement, wherein it is stated that the vessel carried several consignments of general cargo for different consignees from the Port of Humburg. The cargo was entrusted to the carrier in apparent good order and condition and the same was carried carefully and discharged into the custody of the Madras Port Trust, who interposed statutorily to receive the cargo in the same order and condition.

10. The vessel carrying the cargo of the plaintiff arrived at the Port of Madras on 29.03.1987, and as per the custom of the Port, discharged the cargo into the custody of the Madras Port Trust in good order and condition. The request of the plaintiff through its Agent had been rejected, as they had not taken the delivery order after surrendering the original Bill of Lading. In any event, the alleged damage had happened due to negligent and careless handling by the employees of the Madras Port Trust, for which the carrier or its agent cannot be held liable.

11. The plaintiff had failed to conduct a survey before the consignment was moved from the Port Trust and also failed to arrange for a survey by the Madras Port Trust in whose custody the damage must have taken place. The defendants are not liable to compensate the claim, as claimed by the plaintiff.

12. Before the learned Judge, the Assistant Purchase Officer in the Plaintiff's Office was examined as PW.1 and the Insurance Surveyor as PW.2 and Exs.P.1 to P.11 were marked. On the side of the defendants, the Chief Executive of the first defendant was examined as DW.1 and also marked Exs.D.1 to D.12 in support of their defence. The learned Judge, after framing

necessary issues and after considering the claims of both the parties, accepted the case of the plaintiff and decreed the suit as prayed for with costs. Aggrieved by the same, the defendants have preferred the above appeal.

13. Heard Mr. K. Bijai Sundar, learned counsel for the appellants and Mr. R. Santhanam, learned Senior Central Government Standing counsel for the respondent.

14. The point for consideration in this appeal is, whether the plaintiff has proved their claim and whether the learned single Judge is right in granting the decree as prayed for with costs?

15. There is no dispute that the goods referred to in the plaint were despatched at the instance of the plaintiff duly packed on board the vessel S.S. RUMIJA, after obtaining Bill of Lading - Ex.P.2 dated 23.01.1987 with Port of destination at Madras from Hamburg, West Germany. It is also not in dispute that the said vessel arrived at Madras Port Trust on 29.03.1987. It is the case of the plaintiff that their clearing agent, namely M/s. Govias & Sons, Madras, on arrival of the consignment, noticed the damaged condition of the cases and immediately contacted the first defendant,

the shipping agent of the second defendant at Madras on 30.03.1987 vide Ex.D8 and requested them to arrange for the survey of the consignment. The first defendant in their letter dated 31.03.1987 - Ex.D9, has stated that they could not made a survey, as the clearing agent of the plaintiff had not taken the delivery order after surrendering the Original Bill of Lading. It is the categorical assertion of the plaintiff that its clearing agent, before clearing the consignments, promptly informed the first defendant to arrange for the survey in order to find out the extent of damage caused to the consignment, which was not responded. It is also seen that in view of their silence, the clearing agent of the plaintiff has reminded by its letter dated 30.04.1987 - Ex.D.10 and requested the defendants to arrange for the survey of consignment arrived in a damaged condition. At that stage, the first defendant took an untenable stand by their reply dated 05.05.1987 - Ex.D.3, stating that the survey could not be made because the time allowed for a survey had already expired.

16. In the plaint as well as in the evidence of PW.1, it is specifically pleaded / stated that, as per Clause 5 (c) of Bill of Lading, notice of damage was given to the defendants at the earliest point of time under Ex.D.8 dated 30.03.1987. It is seen that it is the defendants who failed to avail that opportunity and refused to accede to the request of the plaintiff on technical grounds. Since the plaintiff has very much relied on the Carrier's Liability set out in relevant Terms and Conditions of Bill of Lading, in which Sub-clause (C) of Clause 5 relates to General Provisions (applicable to port to port shipment or combined transport) and the same was relied on and accepted by the learned Judge, it is useful to refer to the same.

"Sub-clause - C of General Provisions (applicable to port to port shipment or combined transport)
(1) Notice of loss or damage. The carrier shall be deemed prima facie to have delivered the Goods as described in the bill of lading unless notice or loss of damage to the goods indicating the general nature of such loss or damage shall have been given in writing to the carrier or to his representative at the place of delivery before or at the time of removal of the goods into the custody of the person entitled to delivery thereof, under this bill of lading, or, if the loss or damage is not apparent within three consecutive days thereafter. "

17. The materials placed on the side of the plaintiff show that though their clearing agent did not take the delivery order after surrendering the original Bill of Lading, as rightly claimed by the plaintiff and accepted by the learned Judge, at the earliest point of time, i.e., on 30.03.1987, the plaintiff's agent M/s. Govias & Sons sent a notice Ex.D8 to the first defendant seeking to arrange for a survey, since the packages were landed in a dam aged condition. In other words, even on 30.03.1987, the first defendant was put on notice of the fact that the packages were in damaged condition. The learned counsel appearing for the appellant by drawing our attention to Section 2 (4) of the Sale of Goods Act, 1930 would contend that inasmuch as the Bill of Lading is a document of title to the goods, in the absence of production of the same along with the request for survey, the claim

/ stand taken by the plaintiff cannot be accepted. It is true that the Bill of Lading is a document of title to goods and there is no dispute with regard to the same. However, on arrival of the goods at the destination point, namely Port of Madras, the agent of the plaintiff, after verifying that the packages were in a damaged condition, intimated the same at the earliest point of time, i.e., on 30.03.1987 vide Ex.D8, and the defendants, who are none else than the steamer agent and owner of the vessel were duty bound to verify and ascertain the fact of damage at the earliest point of time. Sending intimation on 30.03.1987 as per Ex.D8 was explained by PW.1 and it is his evidence that the Bill of Lading was given on 01.04.1987 and immediately on the next day, i.e., on 02.04.1987, delivery order was obtained. The fact remains that even thereafter there was no survey conducted by the Steamer Agent, namely first defendant.

18. It is further seen that, after waiting for a month, the plaintiff's agent, namely M/s. Govias & Sons sent another notice on 30.04.19 87 - Ex.D.10, reiterating the same demand requesting for a survey to verify and note down the damaged condition of the packages. This time, on receipt of the said notice, as rightly claimed by the plaintiff and observed by the learned Single Judge, the defendants without application of their mind, mechanically sent a reply by forwarding a printed letter on 05.05.1987 under Ex.P3, stating that they could not make survey, since "the time allowed for a survey already expired." The stand taken by the defendants, particularly the first defendant cannot be appreciated and the same is liable to be rejected.

19. Coming to the other question, namely, whether the packages were damaged either during the course of transit or damaged in the hands of the Port, which received the consignments, the tally sheet issued by the Port Trust under Ex.D.11 dated 30.03.1987 clearly refers to the damaged condition of the packages. In this regard, apart from the evidence of PW.1, the plaintiff has very much pressed into service Ex.P.4, which is a letter dated 17.06.1987 issued by Madras Port Trust regarding the condition of the packaged goods received at the Port of Madras. Though the Port Trust has specifically stated that the Port Trust has received the packages, it made a specific endorsement that the packages were "badly damaged". It is not the claim of the defendants that the plaintiff has maneuvered and secured such an endorsement from the Port Trust of Madras. It is relevant to note that DW.1, the only witness examined on the side of the defendants fairly admitted that Ex.D.11 dated 30.03.1987 had been prepared in a hurried manner. In the light of the specific reference in the documents issued by the Port Trust, namely Ex.D.11 dated 30.03.1987 and Ex.P.4 dated 17 .06.1987, making it clear that the goods received were in a damaged condition, we are unable to accept the defence taken by the defendants and we hold that the plaintiff is entitled to compensation for the damaged goods.

20. Though the defendants very much relied on Ex.D.12 dated 13.04.1 987, it is a document said to have been given by the Customs Department. As rightly observed by the learned Judge, in the absence of the fact that defendants were not put on notice, the survey conducted by some one and entry thereof cannot be put against the plaintiff. We are in agreement with the observation and conclusion of the learned Judge with reference to Ex.D.12 dated 13.04.1987. We are satisfied that the plaintiff has established

its claim by acceptable legal evidence that the goods in question were damaged only during transit and the same was evident at the time of delivery to the Madras Port Trust, which authority has made necessary entry for the same in their documents Ex.P4 dated 17.06.1987 and Ex.D.11 dated 30.03.1987 and we are in agreement with the conclusion of the learned Judge that the consignment was damaged only during transit and there is no valid reason for the defendants to reject the survey as requested by the clearing agent of the plaintiff.

21. The learned counsel appearing for the appellants by taking us through Section 230 of the Indian Contract Act, 1872 (in short "the Act") and various decisions would contend that in any event the first defendant, being an Agent is not liable. On going through the provisions and the decisions cited, in the light of admitted fact that the first defendant is a Steamer Agent of the second defendant, who is none else than the owner of the vessel and in the light of the materials placed, we hold that the first defendant is equally liable for the damages caused to the plaintiff. When we are satisfied with the facts, there is no need to refer to various decisions relied on by the learned counsel for the appellant. We are satisfied that the plaintiff has established its case not only by oral evidence, but also by documents issued by the Madras Port Trust vide Exs.D.11 dated 30.03.1987 and P.4 dated 17.06.1987. Further, Sections 186 to 189 of the Act, make it clear about the agent's liability and in the light of the materials placed and discussed, we are satisfied that the first defendant cannot escape from its liability.

22. Though the learned counsel appearing for the appellants very much pressed into service Section 230 of the Act and argued that the agent cannot personally be enforced nor be bound by contracts on behalf of principal, as rightly pointed out, the said provision is subject to Sections 222 and 223 of the Act. On going through those statutory provisions and the materials placed, we are satisfied that both the principal and agent are equally responsible and liable to indemnify the loss caused to the plaintiff.

23. Coming to the quantum of damages as claimed in the suit, we have already referred to the fact that prior to filing of the suit, the plaintiff sent a notice to the defendants Ex.P7 dated 17.11.1987 (Ex.D6 is the original), wherein the plaintiff has furnished all the details about the damages and requested the defendants to settle the same. The fact remains, the defendants failed to settle the claim of the plaintiff. It is also relevant to note that even on receipt of legal notice dated 06.02.1998 under Ex.P.9 (vide postal acknowledgments - Ex.P10 series), the defendants did not send any reply. A perusal of Ex.P9 legal notice shows the specific damages suffered by the plaintiff at the hands of the defendants. As rightly pointed out by the plaintiff and observed by the learned Judge, there is no denial by the defendants about the quantum of damages by sending a reply. Likewise, though the plaintiff has specifically stated regarding the quantum of damages in the plaint, the same has not been specifically denied in the written statement. We have already referred to the final claim from the plaintiff - Ex.P7 dated 11.07.1987, legal notice Ex.P9 dated 06.02.1988 and failure on the part of the defendants in sending a reply, which things make it clear that the defendants have no other valid and legal objection regarding the actual loss, as claimed by the plaintiff. The claim of the plaintiff was rightly appreciated and accepted by the learned Judge; we are also in agreement with the said conclusion.

In the light of what is stated above, we do not find any merit in the appeal; consequently, the appeal fails and the same is dismissed with costs.

Index:Yes
Internet:Yes

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To
1. The Sub-Asst. Registrar
Original Side, High Court, Madras.

2. The Record Keeper
V.R. Section, High Court, Madras.